STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2014
v SHAWN LARALE BRYANT, Defendant-Appellant.	No. 306602 Oakland Circuit Court LC No. 2010-234524-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v SHAWN LARALE BRYANT, Defendant-Appellee.	No. 318765 Oakland Circuit Court LC No. 2010-234524-FH

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

JANSEN, P.J. (*dissenting*).

I respectfully dissent from the majority's decision to reverse the trial court's order vacating defendant's convictions and sentences and granting defendant a new trial in Docket No. 318765.

"This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012) (citations omitted).

In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court set forth the following test:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the

> party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [Quotation marks omitted.]

Subsequently, in *People v Grissom*, 492 Mich 296, 299-300; 821 NW2d 50 (2012), our Supreme Court held:

> [I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *People v Cress.* We further hold that a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial. It may be of a general character and need not contradict specific testimony at trial. Also, the evidence must make a different result probable on retrial.

"[A] question prefatory to the trial court's resolution of whether defendant's newly discovered evidence would make a different result probable on retrial is whether that evidence could be admissible." *Grissom*, 492 Mich at 324 (KELLY, J., concurring).

Like the majority, I assume that the first and third prongs of the *Cress* test were satisfied in this case. And with regard to the second prong of the *Cress* test, I conclude that the newly discovered evidence was not cumulative. With respect to the fourth prong of the *Cress* test, however, I cannot agree with the majority's conclusion that "the impeachment evidence would not make a different result probable upon retrial."

"[N]ewly discovered evidence that impeaches a witness's testimony with false statements made in other cases is expressly permitted." *Grissom*, 492 Mich at 315. I acknowledge that "newly discovered impeachment evidence ordinarily will not justify the grant of a new trial." *Id.* at 317-318. But our Supreme Court has held that "a court should not refuse to grant a new trial solely on the ground that the newly discovered evidence is impeachment evidence" when "(1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial." *Id.* at 318. I believe that both of these conditions are satisfied in the instant case.

The proffered evidence was of false statements and an omission made when obtaining a search warrant in another case involving a search for illegal drugs. In that case, Detective Ferguson's statements were used to establish probable cause. The fact that Detective Ferguson's past statements were false suggests a pattern of lying and an underlying motive to lie. These similar past lies could well discredit Detective Ferguson in the instant case. See *id.* at 317. I conclude that there is a material, exculpatory connection between the newly discovered impeachment evidence and the evidence presented at trial, even though the impeachment evidence did not directly contradict Detective Ferguson's trial testimony. *Id.* at 299-300, 317; see also *United States v Davis*, 960 F2d 820, 825 (CA 9, 1992).

I also conclude that the impeachment evidence would make a different result probable upon retrial. It is true that the testimony of Officer Jeff Fletemier and Sergeant Brent Miles independently supported defendant's convictions. Their combined testimony tended to establish that defendant exited apartment 13, threw the gun and heroin over the balcony, and jumped over

the wall to the balcony of apartment 15. However, the fact that other officers lied for Detective Ferguson in a previous case could very well lead the jury to disbelieve the other officers' testimony in the present case. Moreover, defendant could use the evidence that Detective Ferguson made false statements to obtain a search warrant in the previous narcotics case to challenge the credibility of Ferguson, himself, in this case. The evidence that Detective Ferguson lied about narcotics to obtain the search warrant in the previous case could reasonably lead a jury to conclude that Ferguson lied about the narcotics at issue here. If the credibility of Ferguson and the other officers had been successfully impeached, there would have been insufficient evidence to convict defendant. I conclude that the newly discovered impeachment evidence would make a different result probable upon retrial.

I note that it is beyond the capability of this Court to foretell the future. We simply have no way of knowing whether a rational jury would credit or discredit the testimony of Ferguson and the other officers on retrial if presented with the newly discovered evidence. But this fact, alone, should not foreclose defendant's opportunity to present the impeachment evidence now that it has been discovered.

In addition, contrary to the prosecution's argument, the newly discovered impeachment evidence could likely be admitted under either MRE 608 or MRE 404(b). Under MRE 608(a), Detective Ferguson's credibility could be attacked by evidence in the form of opinion or reputation regarding his character for untruthfulness. This could be established by any witness who is aware of Detective Ferguson's reputation. And under MRE 608(b), specific instances of Detective Ferguson's conduct, if probative of untruthfulness, could be inquired into on cross-examination. Furthermore, pursuant to MRE 404(b), evidence that Ferguson lied in another case may well be admissible as proof of a scheme, plan, or motive to lie. See *Grissom*, 492 Mich at 316 (stating that "[i]f the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive"). Whether brought in under MRE 608 or MRE 404(b), I believe that the impeachment evidence would be highly probative of Ferguson's character for untruthfulness and that the probative value would not be substantially outweighed by the dangers of undue prejudice or jury confusion. MRE 403.

Because the newly discovered impeachment evidence would be admissible and would make a different result probable upon retrial, the trial court did not abuse its discretion by vacating defendant's convictions and sentences and granting defendant's motion for a new trial. For these reasons, I would affirm in Docket No. 318765. I accordingly find it unnecessary to reach the merits of defendant's claims of error in Docket No. 306602.

/s/ Kathleen Jansen